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**UNITED STATES BANKRUPTCY COURT
 DISTRICT OF NEVADA**

In re
 LAS VEGAS MONORAIL COMPANY,
 a Nevada non-profit corporation,
 Debtor.
 AMBAC ASSURANCE CORPORATION
 and The Segregated Account of Ambac
 Assurance Corporation,
 Appellants.
 v.
 LAS VEGAS MONORAIL COMPANY,
 a Nevada non-profit corporation,
 Appellees.

Chapter 11
 Case No. BK-S-10-10464-BAM

APPEAL NO. 10-11

**MOTION FOR LEAVE TO APPEAL BY
 AMBAC ASSURANCE CORPORATION AND
 THE SEGREGATED ACCOUNT OF AMBAC
 ASSURANCE CORPORATION (FED. R.
 BANKR. P. 8001(b) AND 8003)**

**(TO BE TRANSMITTED TO THE U.S.
 DISTRICT COURT PURSUANT
 TO FED.R.BANKR. P. 8003(b))**

1 Ambac Assurance Corporation, on its own behalf and for The Segregated Account of
 2 Ambac Assurance Corporation, and the Segregated Account of Ambac Assurance Corporation by
 3 its court appointed Rehabilitator, the Office of the Commissioner of Insurance for the State of
 4 Wisconsin, (collectively “**Ambac**”),¹ creditors, hereby move, pursuant to Federal Rules of
 5 Bankruptcy Procedure 8001(b) and 8003, for leave to appeal the order denying Ambac’s Motion
 6 to Dismiss entered on April 26, 2010 [Docket No. 341] (“**Order**”) by the United States
 7 Bankruptcy Court for the District of Nevada (“**Bankruptcy Court**”). A true and correct copy of
 8 the Order is attached hereto as **Exhibit A**. The appeal involves questions of law as to which there
 9 is no controlling decision of the Ninth Circuit Court of Appeals or the Ninth Circuit Bankruptcy
 10 Appellate Panel, on which there is substantial ground for difference of opinion. An immediate
 11 appeal will also materially advance the ultimate termination of this matter and avoid wasted
 12 litigation. Finally, the issues raised in this appeal involve matters of great public importance in
 13 the State of Nevada and nationwide, and those matters should not have to wait for appeal until the
 14 Bankruptcy Court enters a final order in this case. For these reasons, and as set forth more fully
 15 below, Ambac respectfully requests this Court grant it leave to appeal the Bankruptcy Court’s
 16 Order.

19 _____
 20 ¹ Ambac’s interest in these proceedings arises under three arrangements related to the 1st Tier Bonds, described
 21 below. First, Ambac has insured the payment of scheduled amounts of principal and interest on the 1st Tier Bonds
 22 pursuant to its Municipal Bond Insurance Policy Number 17548BE, dated September 20, 2000 (the “**Policy**”).
 23 Second, Ambac has guaranteed payments from the Debt Service Reserve Fund for the 1st Tier Bonds in an amount
 24 not to exceed \$20,991,807.50 under a surety bond (the “**Surety Bond**”) it issued to the Trustee. Third, Ambac owns
 25 \$8.5 million in principal amount of 1st Tier Bonds. As noted by the Bankruptcy Court, Ambac estimates that its
 26 exposure over the life of the bond issue is about \$1.16 billion. Order at 4, n.5.

On March 24, 2010, at the request and with the approval of the Office of the Wisconsin Commissioner of
 Insurance (“**Commissioner**”), Ambac established a segregated account (the “**Segregated Account**”) for certain
 contracts, including the Surety Bond and the Policy for the 1st Tier Bonds. The Commissioner then commenced
 rehabilitation proceedings for the Segregated Account in the Circuit Court for Dane County, Wisconsin. Ambac
 continues to service the Surety Bond and the Policy, subject to the oversight of the Commissioner, as rehabilitator,
 and the Dane County Court. It is anticipated that following the approval of a plan of rehabilitation, Segregated
 Account policy claims will be paid as they arise through a combination of cash and interest-bearing surplus notes.

1 **I. STATEMENT OF QUESTIONS AND RELIEF SOUGHT**

2 Ambac seeks this Court's review of the Bankruptcy Court's Order denying Ambac's
3 Motion to Dismiss. The key issues Ambac will raise on appeal are:

- 4 • Whether the Bankruptcy Court erred as a matter of law when it concluded that the
5 Debtor is not a "municipality as defined in section 101(40) of the Bankruptcy
6 Code; and
- 7 • Whether the Bankruptcy Court erred as a matter of law when it concluded that the
8 Debtor qualifies as a "person" under section 101(41) of the Bankruptcy Code that
9 is eligible to be a debtor under chapter 11 pursuant to section 109(d) of the
10 Bankruptcy Code.

11 Contrary to the Bankruptcy Court's ruling, based upon the undisputed facts and applicable
12 legal authorities, the Debtor is a municipality under the Bankruptcy Code as an instrumentality of
13 the State of Nevada because it is controlled by the Governor of the State of Nevada. Because the
14 Debtor is a municipality under the Bankruptcy Code, it is not eligible to be a debtor under chapter
15 11. Accordingly, the Bankruptcy Court lacks authority to proceed with the Debtor's chapter 11
16 filing, and it erred as a matter of law when it created a legal framework never before applied in
17 the Ninth Circuit or elsewhere to deny Ambac's Motion to Dismiss.

18 **II. STATEMENT OF FACTS**

19 The Debtor, Las Vegas Monorail Company ("LVMC" or the "**Debtor**"), is a nonprofit
20 corporation organized under the laws of the State of Nevada in 2000 for the purpose of acquiring
21 an existing monorail and expanding it to run 3.9 miles just east of the Las Vegas Strip
22 ("**Monorail**"). Order at 2, 2 n.1. LVMC claims exemption from federal income taxation under
23 section 501(c)(4) of the Internal Revenue Code, 26 U.S.C. § 501(c)(4), and it is exempt from state
24 sales and use taxation under section 372.3261 of the Nevada Revised Statutes. *Id.* at 2 n.1. As a
25 tax-exempt nonprofit corporation, all of LVMC's property, assets, profits and net revenues are
26 irrevocably dedicated to the public purposes for which it was formed.

1 The Monorail was originally owned by MGM Grand-Bally's Monorail Limited Liability
2 Company (the "**Original Owner**"), a joint venture between MGM Grand Monorail, Inc., and
3 Bally's Grand, Inc. Official Statement at 2, which is part of the record as Ambac Hearing Exhibit
4 82. In 2000, the Original Owner sold the Monorail to LVMC. *Id.* In order to secure tax-exempt
5 financing sufficient for LVMC to acquire the existing monorail and expand it, the Director of the
6 State of Nevada Department of Business and Industry (the "**Director**") issued two series of
7 governmental revenue bonds: (a) the \$451,448,217.30 original principal amount 1st Tier Series
8 2000 (the "**1st Tier Bonds**"); (b) the \$149,200,000 original principal amount 2nd Tier Series
9 2000 (collectively with the 1st Tier Bonds, the "**Senior Bonds**"); and (c) the \$48,500,000 original
10 principal amount 3rd Tier Series 2000 (collectively with the Senior Bonds, the "**Bonds**"). Order
11 at 2-3. *See also* Official Statement at 1. The Director issued the Senior Bonds pursuant to a
12 Senior Indenture between Wells Fargo Bank, as trustee ("**Trustee**"), and the Director. Order at 3.
13 The Director loaned the proceeds of the Bonds to LVMC pursuant to a Financing Agreement
14 between LVMC and the Director. *Id.*

15 To qualify to receive the proceeds of the sales of the tax-exempt governmental Bonds, and
16 to protect the State of Nevada from liability for payment on the Bonds, LVMC and the Director
17 executed a Tax Certificate and Agreement (the "**Tax Certificate**") under which LVMC expressly
18 represented that it was an "instrumentality of the State of Nevada" and that it was "controlled by
19 the Governor of the State of Nevada." Tax Certificate, a copy of which is in the record as Ambac
20 Hearing Exhibit 2. As the Bankruptcy Court explained, "LVMC's instrumentality status was
21 critical to the Director's issuance of the Bonds. That status allowed the Director to offer the
22 Bonds on the basis that interest payments would be free of federal tax, which in turn lowered
23 LVMC's cost of expanding and running the monorail." Order at 29.

24 Not only did LVMC represent that it was an instrumentality of the State controlled by the
25 Governor, the undisputed facts support those representations. The State of Nevada controls major
26 aspects of LVMC's governance, financial affairs, and operations. For instance, all appointments

1 to LVMC's Board of Directors must be approved by the Governor. Bylaws §§ 6.02 and 6.04, a
 2 copy of which is in the record at Ambac Hearing Exhibit 4. Moreover, the LVMC Board must
 3 notify the Governor of its recommendation to reappoint or replace a director whose term is
 4 expiring, and if the Governor disapproves of the Board's first two nominees, then the Governor
 5 may appoint the successor director without Board input or approval. Bylaws § 6.04. Notably, the
 6 Governor may refuse to appoint or reappoint a director, for any reason or no reason at all, at his
 7 sole discretion. In addition, the Governor may remove any director from LVMC's Board of
 8 Directors for cause. Bylaws § 6.03. No director may be removed from office by the Board of
 9 Directors without the Governor's approval. *Id.* If the Governor disapproves of the Board's
 10 recommendation for removal, the director shall not be removed from the Board. *Id.*

11 LVMC also must obtain the Governor's approval of its annual budgets, financial reports,
 12 any material alterations to its annual budget or financial reports, any major expenditures for
 13 enhancements or repairs of the Monorail, and any proposed changes to the rate schedule.²
 14 Bylaws § 6.12. If the Governor disapproves of any such matter, the Board cannot proceed with
 15 such action. *Id.* The Governor has the right to inspect and audit all of LVMC's books, records,
 16 and documents of every kind. Bylaws § 8.03.

17 LVMC's Articles of Incorporation and Bylaws may not be amended or repealed without
 18 the approval of the Governor. Articles of Incorporation Art. IV³; Bylaws Art. X. And, upon the
 19 dissolution of LVMC, all of its assets remaining after the discharge of its liabilities must be
 20 distributed to the Governor or to a designated agency of the State of Nevada. Articles of
 21 Incorporation, Art. III.

22 Finally, LVMC must make its annual budget and any material modifications thereto
 23 available to the public. Tax Certificate ¶ 3.3.5. Moreover, any meeting of the Board of Directors
 24 at which the annual budget is adopted must be noticed as a public meeting, open to public

25 ² The Governor cannot disapprove of rate changes, however, if such changes are mandated under the Rate Covenant
 (as defined in the Bylaws). Bylaws § 6.12.

26 ³ A copy of the Articles of Incorporation is part of the record at Ambac Hearing Exhibit 3.

1 attendance, and public comment must be permitted. *Id.* Minutes of all meetings of the Board of
2 Directors must be available for public review (but proprietary or confidential information may be
3 deleted from the minutes). *Id.* Notably, a representative of the Governor or the Director
4 attended, in person, not less than 50 meetings of the LVMC Board of Directors since 2004.
5 Summary Chart, which is part of the record as Ambac Hearing Exhibit 14.

6 On January 13, 2010, LVMC filed a petition under chapter 11 of title 11 of the United
7 States Code (the “**Bankruptcy Code**”). That day, Ambac moved to dismiss LVMC’s petition on
8 the grounds that LVMC is an instrumentality of the State of Nevada and, therefore, is not a
9 “person” eligible to be a debtor under chapter 11 pursuant to section 109(d) of the Bankruptcy
10 code [Docket No. 8] (“**Motion to Dismiss**”). The Bankruptcy Court held a hearing on Ambac’s
11 Motion to Dismiss on February 17, 2010. On April 26, 2010, the Bankruptcy Court issued its
12 Order denying Ambac’s Motion to Dismiss [Docket No. 341].

13 As discussed in more detail below, Ambac asserts that the Bankruptcy Court erred as a
14 matter of law when it concluded that (a) LVMC is not a “municipality” as defined in section
15 101(40) of the Bankruptcy Code, and (b) LVMC qualified as a “person” under section 101(41) of
16 the Bankruptcy Code that is eligible to be a debtor under chapter 11 pursuant to section 109(d) of
17 the Bankruptcy Code. The Bankruptcy Court, in essence, created a new legal framework
18 analyzing the controlling question of law, and in doing so, disregarded the body of applicable
19 case law, and other legal authority, addressing the issue of “control” in the context of what
20 constitutes an “instrumentality of the State” under 11 U.S.C. § 101(40).

21 As further discussed below, Ambac requests leave to appeal the Order because the appeal
22 involves controlling questions of law as which there are substantial grounds for difference of
23 opinion, and an immediate appeal would materially advance the ultimate termination of the
24 litigation.

III. LEAVE TO APPEAL THE DENIAL OF AMBAC'S MOTION TO DISMISS SHOULD BE GRANTED

In its discretion, a district court may grant leave to review an interlocutory order of the bankruptcy court. 28 U.S.C. § 158(a)(3); *Cutter v. Seror (In re Cutter)*, 398 B.R. 6, 16 (9th Cir. BAP 2008). The standards set forth in 28 U.S.C. § 1292(b) guide the court in determining whether to grant leave to appeal from a bankruptcy court's interlocutory order. *In re Price*, 79 B.R. 888, 889 (9th Cir. BAP 1987), *aff'd*, 871 F.2d 97 (9th Cir. 1989). Under section 1292(b), the court may grant leave to appeal an interlocutory order if the order being appealed (1) involves a controlling question of law, (2) for which there is a substantial ground for difference of opinion and (3) an immediate appeal would materially advance the ultimate termination of the litigation. *Id.* Cf. *In re Kashani v. Fulton*, 190 B.R. 875, 882 (9th Cir. BAP 1995) (noting that leave to appeal should be granted if "the order involves a controlling question of law where there is a substantial ground for difference of opinion"). As explained below, all three standards are met in this case. Accordingly, Ambac respectfully asks this Court to grant it leave to appeal the Bankruptcy Court's Order denying its Motion to Dismiss.

A. The Motion to Dismiss Order Involves a Controlling Question of Law.

The first factor contained in 28 U.S.C. § 1292(b) considers whether the Bankruptcy Court's Order involves a "controlling question of law." Ambac's Motion to Dismiss questioned whether the Bankruptcy Court had proper jurisdiction over LVMC's chapter 11 filing because LVMC constitutes an "instrumentality of the State".⁴

In particular, the central question of law presented in Ambac's Motion is whether LVMC

⁴ Other Courts have held that the threshold issue of eligibility is not jurisdictional. See *In re Wenberg*, 94 B.R. 631, 637 (9th Cir. BAP 1988) *aff'd Wenberg v. FDIC (In re Wenberg)*, 902 F.2d 768 (9th Cir. 1990) (noting that Section 109 eligibility is not jurisdictional); *In re First Assured Warranty Corp.*, 383 B.R. 502, 518-19 (Bankr. D. Colo. 2008) (although the issue of whether the debtor is eligible for relief is not jurisdictional, dismissal for failure to meet the requirements for filing a petition is a core issue). Here, however, LVMC's lack of eligibility to be a debtor under chapter 11 results from it being an instrumentality of the state, and thereby touches upon the constitutional issue of whether a federal court may exercise power over an instrumentality of a state. Such a constitutional issue implicates the jurisdiction and power of a federal court, and thereby LVMC's lack of eligibility under chapter 11 is a jurisdictional issue in this instance.

1 is a “person” otherwise eligible to seek chapter 11 protection pursuant to section 109(d) of the
 2 Bankruptcy Code. The definition of “person,” however, specifically excludes a “governmental
 3 unit.” 11 U.S.C. § 101(41). Furthermore, the term “governmental unit” is defined to specifically
 4 include a “municipality.” 11 U.S.C. § 101(27). “Municipality” is defined to include a “political
 5 subdivision or public agency or *instrumentality of a State*.” 11 U.S.C. §101(40) (emphasis
 6 added). Therefore, a “person” eligible for chapter 11 protection cannot be an “instrumentality of
 7 the State” or, in turn, a “municipality.”

8 Courts addressing the scope of the term “municipality” focus upon the extent to which the
 9 entity in question is subject to control by the state. *In re Greene County Hosp.*, 59 B.R. 388, 389
 10 (Bankr. S.D. Miss. 1986) (holding that the county hospital was a municipality under the
 11 Bankruptcy Code); *In re Westport Transit Dist.*, 165 B.R. 93, 96 (Bankr. D. Conn. 1994) (holding
 12 that the transit district qualified as a hybrid public agency of both the state and town, and thus the
 13 district was a municipality under the Bankruptcy Code); *In re Ellicott School Bldg. Auth.*, 150
 14 B.R. 261, 264 (Bankr. D. Colo. 1992) (holding that the school building authority was not a
 15 “municipality” within the meaning of the Bankruptcy Code). Supported by such legal authority,
 16 Ambac argued that the extensive control rights possessed by the Governor of the State of Nevada
 17 over LVMC’s governance and material financial affairs qualified LVMC as an “instrumentality
 18 of the State,” and not a “person,” for the purposes of the Bankruptcy Code.

19 Whether LVMC is an “instrumentality of the State” is a purely legal issue which will be
 20 reviewed *de novo* on appeal. *See* Order at 6 (“Determining the proper scope of section 101(40)’s
 21 use of ‘instrumentality’ raises significant questions of statutory interpretation.”) The underlying
 22 facts pertaining to the rights and control that LVMC ceded to the Governor of the State of Nevada
 23 (as described above) are undisputed. What is disputed, however, is the legal significance to be
 24 attributed to such State oversight and whether such significant State involvement renders LVMC
 25 an “instrumentality of the State.” Thus, the issue presented by Ambac’s appeal is purely a
 26 question of law that is ripe for adjudication by this Court.

Furthermore, the resolution of this issue goes to the heart of whether LVMC is “eligible” to file a chapter 11 bankruptcy petition and whether the Bankruptcy Court has authority over LVMC’s petition. *See In re Grouphealth P’ship, Inc.*, No. 92-0124, 1992 WL 96333, at *2 (E.D. Pa. Apr. 21, 1992) (concluding that “the question of whether an HMO is an insurance company for purposes of the bankruptcy code is a purely legal question that controls whether the Bankruptcy Court has jurisdiction over” the Debtor’s petition); *see also In re Betta Prods., Inc.*, No. C 07-0425 WHA, 2007 U.S. Dist. LEXIS 81621, at *4 (N.D. Cal. Oct. 15, 2007) (explaining that the denial of the motion to dismiss involved a controlling question of law as to whether the decisions in earlier litigation were final); *In re Bertain*, 215 B.R. 438, 441 (9th Cir. BAP 1997) (recognizing that the review of a denial of a motion to dismiss involved a controlling issue of law); *In re Burke*, 95 B.R. 716, 717 (9th Cir. BAP 1989) (same). Copies of these decisions are attached as Exhibits 1 and 2, respectively.

For the reasons set forth above, the issue raised by Ambac’s Motion to Dismiss is a controlling issue of law and this Court’s review of such a legal question should not be postponed. *See, e.g., In re City of Vallejo*, 408 B.R. 280, 285 n.3 (9th Cir. BAP 2009) (certifying the bankruptcy court’s order to the Ninth Circuit Court of Appeals under 28 U.S.C. § 158(d)(2) and Rule 8001(f)(4) because the order involved a matter of public importance).

B. Substantial Grounds for Difference of Opinion Exists Regarding the Bankruptcy Court’s Denial of Ambac’s Motion to Dismiss.

The second factor contained in 28 U.S.C. § 1292(b) considers whether there is “substantial ground for difference of opinion” as to the controlling question of law. Courts in the Ninth Circuit and elsewhere have held that a substantial ground for difference of opinion exists where the bankruptcy court’s ruling conflicts with caselaw or contravenes the rulings of appellate courts which have addressed the issue. *See, e.g., McDonald v. Sperna (In re Sperna)*, 173 B.R. 654, 658 (9th Cir. BAP 1994) (recognizing that “there have been numerous opinions published on this [controlling legal] issue which express conflicting views.”); *In re Betta Prods., Inc.*, 2007

1 U.S. Dist. LEXIS 81621 at *5 (stating that “there is a split among courts in different circuits”
 2 with respect to the controlling issue of law); *In re Grouphealth P’ship, Inc.*, 1992 U.S. Dist.
 3 LEXIS 5277 at *5 (noting the existence of a split among circuit courts). As described below, the
 4 Bankruptcy Court’s Order creates a new legal framework for analyzing the controlling question
 5 of law, and in doing so it disregards the body of applicable caselaw and other legal authority
 6 addressing the issue of “control” in the context of what constitutes an “instrumentality of the
 7 State” under section 101(40) of the Bankruptcy Code.

8 There is no controlling decision of the Ninth Circuit Court of Appeals or the Ninth Circuit
 9 Bankruptcy Appellate Panel on the question of law addressed by the Bankruptcy Court.
 10 However, case law and statutory guidance exists with respect to the defining characteristics of a
 11 “municipality” or an “instrumentality of a State” under section 101(40) of the Bankruptcy Code.
 12 In its revisions to the statute, Congress has clearly intended to expand “the applicability of
 13 chapter IX as much as possible.” H.R. Rep. No. 94-686, 94th Cong., 1st Sess. 20 (1975) (noting
 14 that certain changes to the eligibility requirements to chapter 9 debtors were intended to broaden
 15 the applicability of chapter 9); S. Rep. No. 94-458, at 13, 94th Cong. 1st Sess. (1975) (“The
 16 provisions of [chapter 9] should provide ready access to the bankruptcy courts.”). These
 17 authorities recognize, explicitly or implicitly, that the existing definition of municipality was
 18 enacted by Congress in 1976 in order “to broaden applicability of Chapter IX as much as
 19 possible.” H.R. Rep. No. 94-686, 94th Cong., 1st Sess. 20 (1975); 6 *Collier on Bankruptcy*
 20 ¶900.02[2][a] at 900-11 (15th ed. 2007) (“Congress intended the definition of municipality to be
 21 expansive ...”); *see also Hamilton Creek Metro. Dist. v. Bondholders Colo. Bondshares (In re*
 22 *Hamilton Creek Metro Dist.)*, 143 F.3d 1381, 1384 (10th Cir. 1998) (“To be eligible for chapter 9
 23 relief, a petitioner must meet several criteria, which are to be construed broadly to provide access
 24 to relief in furtherance of the Code’s underlying policies.”); *In re City of Vallejo*, 408 B.R. 280,
 25 289 (9th Cir. BAP 2009) (“We construe broadly § 109(c)’s eligibility requirements to provide
 26 access to relief in furtherance of the Code’s underlying policies.”) (citations omitted); *In re Pierce*

1 *County Housing Auth.*, 414 B.R. 702, 710 (Bankr. W.D. Wash. 2009) (“The eligibility
2 requirements of 109(c) are to be broadly construed to provide access to relief in furtherance of the
3 Code’s underlying policies.”) (citations omitted); *In re Valley Health Sys.*, 383 B.R. 156, 163
4 (Bankr. C.D. Cal. 2008) (“Section 109(c)’s eligibility requirements are to be construed broadly to
5 provide access to relief in furtherance of the Code’s underlying policies.”) (citations omitted).

6 Honoring this clear expression of legislative intent, substantially all of the courts
7 addressing this issue have determined that a putative debtor which otherwise lacks traditional
8 governmental powers (*e.g.*, the power to levy taxes, the power to exercise eminent domain, etc.)
9 is nevertheless a “municipality” for bankruptcy purposes if it is controlled by the state (or county
10 or municipal authority, as creatures of the state). *E.g.*, *In re Greene County Hosp.*, 59 B.R. at 389
11 (community hospital held to be a municipality based on county control over the ownership or
12 leasing of hospital property); *Ex parte York County Natural Gas Auth.*, 238 F. Supp. 964
13 (W.D.S.C. 1965) (“The legal test between a private or public authority or agency is whether the
14 authority or agency is subject to control by public authority, state or municipal”); *In re Westport*
15 *Transit Dist.*, 165 B.R. at 95 (recognizing that a putative debtor is a municipality if it is subject to
16 control by a public authority, the state, or a municipality); *In re Ellicott School Bldg. Auth.*, 150
17 B.R. at 264 (following the control tests described in *Greene County Hospital* and *York County*
18 *Natural Gas Authority*, but holding that the putative debtor was not a municipality because “no
19 governmental entity exercises any right of control” over the authority).

20 Under the foregoing authorities, the Nevada Governor’s extensive powers of control over
21 LVMC would provide strong, if not conclusive, support for a determination that LVMC is an
22 instrumentality of the State for the purposes of section 101(40) of the Bankruptcy Code. Indeed,
23 major aspects of LVMC’s governance, financial affairs and operations are controlled by the
24 Governor. *See* Order at 4 n.3 (“The level of control is fairly expansive.”); Order at 37 (“It is
25 beyond doubt that Nevada’s involvement in LVMC is significant, and some might say too
26 intrusive for LVMC to be purely private.”). Moreover, in stark contrast to LVMC’s undisputed

1 factual representation in the Tax Certificate, admitted into evidence by the Bankruptcy Court,
2 none of the foregoing courts applying the legal test of “control” were faced with a prior written
3 representation by the debtor that it was an instrumentality of the state and that it was controlled by
4 the governor of such state.

5 Although the Bankruptcy Court described many of the relevant municipality case and
6 statutory authorities in its Order, it largely ignored this body of law in favor of creating a new
7 legal framework. The focus of this new test is not the extent to which state control exists over a
8 putative debtor, but whether state control exists “to protect public finances or the public fisc” or
9 in relation “to essential state sovereignty and essential state functions.” Order at 37. In applying
10 this new test, the Bankruptcy Court held that LVMC is not an instrumentality or municipality for
11 bankruptcy purposes, purportedly because the Governor’s significant and undisputed powers of
12 control over LVMC were not imposed to protect the State’s tax coffers and they bear little
13 relationship to the State’s traditional public functions. Order at 38-39.

14 In support of its ruling on the controlling question of law, the Bankruptcy Court states, in
15 general fashion and without specific citation, that “[t]he Governor’s control, then, while
16 extensive, is not the type of control that historically has caused courts to label entities or
17 enterprises instrumentalities of the State.” Order at 39. Contrary to this statement, however, the
18 Bankruptcy Court’s ruling has little, if any, caselaw or statutory support. In fact, the new
19 instrumentality test created by the Bankruptcy Court directly contradicts the Congressional
20 intention for the Bankruptcy Code definition of “municipality” to be expansive. Likewise, this
21 new test runs contrary to the relevant case decisions, substantially all of which emphasize the
22 extent of state control, not the purposes of state control, in deciding whether a putative debtor is
23 an instrumentality of the state for bankruptcy-eligibility purposes. Indeed, the Bankruptcy
24 Court’s view on the purpose of such state control (and, in particular, the protection of the public
25 fisc) raises public policy questions best reserved for determination by the legislature.

26 Because the new instrumentality test crafted by the Bankruptcy Court conflicts with

1 and/or contravenes applicable caselaw and legal authority, a substantial ground for differences of
2 opinion exists to justify this Court's review of the Order.

3 **C. An Immediate Appeal Would Materially Advance the Ultimate**
4 **Termination of the Litigation.**

5 For leave to appeal an interlocutory order to be granted, appellate review must advance
6 the litigation and conserve time and resources. *In re JWW Contracting Co.*, 287 B.R. 501, 506 n.7
7 (9th Cir. BAP 2002); *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1027 (9th Cir. 1982); *Kashani*
8 *v. Fulton (In re Kashani)*, 190 B.R. 875, 883 (9th Cir. BAP 1995). Appellate review materially
9 advances the litigation where resolution of the appeal, if decided in appellant's favor, "would
10 materially advance the ultimate termination of litigation by depriving the Bankruptcy Court of
11 jurisdiction." *In re Grouphealth P'ship, Inc.*, 1992 U.S. Dist. LEXIS 5277, at *6. Furthermore,
12 the Ninth Circuit Bankruptcy Appellate Panel in *JWW Contracting* noted that the immediate
13 appeal "will materially advance the termination of this litigation because it will provide an
14 appropriate framework for the bankruptcy court and the parties to resolve the underlying dispute."
15 *JWW Contracting*, 287 B.R. at 506 n.7. In addition, the *JWW Contracting* court explained that
16 "denying leave to appeal will result in wasted litigation and expense because the parties will
17 likely return here for an answer." *Id.*

18 In this case, Ambac is seeking review of the Bankruptcy Court's denial of Ambac's
19 Motion to Dismiss questioning the Bankruptcy Court's authority to proceed with LVMC's
20 chapter 11 bankruptcy case. If Ambac is correct and the Bankruptcy Court lacks jurisdiction over
21 LVMC, all actions taken by the Bankruptcy Court with respect to LVMC's petition will be void.
22 LVMC's estate should not expend time and resources pursuing a chapter 11 reorganization in the
23 Bankruptcy Court, when the possibility exists that such restructuring could be subsequently
24 rendered null and void by a determination that the Bankruptcy Court lacked proper jurisdiction
25 over LVMC. Moreover, Ambac's appeal (whenever pursued) cannot be rendered moot if the
26 Bankruptcy Court lacked jurisdiction to proceed with the LVMC's bankruptcy case in the first

1 place. *See Neary v. Padilla (In re Padilla)*, 222 F.3d 1184, 1189 (9th Cir. 2000).

2 As a result, immediate appellate review, rather than appellate review postponed until after
3 a reorganization plan is confirmed, will materially advance the litigation and conserve the time
4 and resources of the courts.

5 **IV. CONCLUSION**

6 Ambac's Motion to Dismiss involves the purely legal issue of whether LVMC is an
7 instrumentality of the State of Nevada under the broad definition of municipality set forth in
8 section 101(40) of the Bankruptcy Code. Ample authority supports the conclusion that LVMC is
9 an instrumentality and therefore a municipality, and as such is ineligible to be a debtor under
10 chapter 11 of the Bankruptcy Code. As such, substantial grounds for difference opinion exists on
11 the controlling issue of law raised by Ambac's appeal. Immediate interlocutory review of the
12 Bankruptcy Court's decision that LVMC is not an instrumentality of the State will materially
13 advance the litigation since it goes to the central issue of whether the Bankruptcy Court has
14 proper jurisdiction over LVMC. For all of the reasons set forth herein, Ambac respectfully asks
15 this Court to grant it leave to appeal the Bankruptcy Court's Order denying Ambac's Motion to
16 Dismiss.

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1 Dated: May 10, 2010

Respectfully submitted,

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